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No. 281

Supreme Court of the United States.

OCTOBER TERM, 1944.

SAMUEL SANDBERG ET AL.,
Petitioners,

v.

NEW ENGLAND NOVELTY CO., INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement of the Case.

In addition to the facts set forth in the petition for writ of certiorari and the opinion of the Supreme Judicial Court of Massachusetts, incorporated in the transcript of record accompanying said petition, the Court's attention is directed to the following additional facts: The preliminary injunction was issued on October 22, 1941 (Record, page 31), and the petition for contempt was filed on October 24, 1941 (Record, page 34). The defendants in the original proceeding (petitioners herein) did not object to the interlocutory decree ordering this preliminary injunction (Record, page 29, Memorandum). The marching back

and forth by the groups occurred every day only at about the times that the shift of employees was changing; employees and persons going to and from the plant had to pass by the gate at which this marching took place (Record, page 7). The marching took place in military fashion in groups of two or three, one behind the other, the group consisting of twenty-five or thirty men, the group walking the entire length of the fence, and actually walking by the entrance and back again (Record, page 9). This marching and congregating took place on Adams Street and Cotton Street, the streets mentioned in the injunction (Record, page 30, paragraph 3). The marchers were visible to employees working inside the plant (Record, page 6). The groups of strikers and the pickets congregated in the streets, and refused to move from Adams Street and Cotton Street when requested to do so by the police (Record, pages 10 and 11).

Statutory Provisions.

MASSACHUSETTS GENERAL LAWS (TER. ED.) CHAPTER 220, SECTION 13A (ACTS OF 1935, CHAPTER 407, SECTION 5).

"Any person who shall wilfully disobey any lawful writ, process, order, decree or command of the court in any suit in which injunctive relief is sought in any matter involving or growing out of a labor dispute, as defined in section twenty C of chapter one hundred and forty-nine, by doing any act or thing in or by such writ, process, order, decree or command forbidden to be done by him, if the act or thing so done by him is of such character as to constitute also a criminal offence under the laws of the commonwealth shall enjoy the right to a speedy and public trial for his said contempt by an impartial jury of the county wherein it shall have been committed; provided, that this

right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or apply to the misbehavior, misconduct or disobedience of any officer of the court in respect to the writs, orders or process of the court."

MASSACHUSETTS GENERAL LAWS (TER. ED.), CHAPTER 214, SECTION 9A (ACTS OF 1935, CHAPTER 407, SECTION 4).

"(6) Whenever the court shall issue or deny a preliminary injunction in a case involving or growing out of a labor dispute, the court, upon the request of any party to the proceeding, shall forthwith report any questions of law involved in such issue or denial to the supreme judicial court and stay further proceedings except those necessary to preserve the rights of the parties. Upon the filing of such report, the questions reported shall be heard in a summary manner by a justice of the supreme judicial court, who shall with the greatest possible expedition affirm, reverse or modify the order of the superior court. The decision of such justice of the supreme judicial court upon the questions so raised shall be final, but without prejudice to the raising of the same questions before the full court upon exceptions, appeal or report after a final decree in the case."

Jurisdictional Statement.

The respondent does not question the jurisdiction of the United States Supreme Court to review the matters here in question.

Issues Presented.

The issues presented by the petition for the writ of certiorari are:

I. Did the petitioners' conduct come within the protection of the right of free speech and free press guaranteed by the Fourteenth Amendment of the United States Constitution?

II. Did the trial judge commit reversible error in refusing to grant petitioners' motion for a directed verdict, and to instruct the jury in accordance with petitioners' request?

III. The convictions for contempt were not based on insubstantial or inadequate findings of fact.

IV. The preliminary injunction was not vague or ambiguous.

V. The imposition of criminal penalties does not make this a criminal proceeding.

VI. The preliminary injunction was in full force and effect at the time of the acts which were the basis of the contempt adjudication.

Argument.

I. The petitioners have not been deprived of their rights under the Fourteenth Amendment.

In approaching this issue it should be clearly borne in mind that the question before the Court does not relate to the propriety of the issuance of the injunction, but rather to the interpretation of its language, and whether the petitioners have violated its terms. In this contempt proceeding, as in all contempt proceedings, as is pointed out in the opinion of the Supreme Judicial Court (1944 Adv. Sh. 433, 441), the sole issue presented is whether the peti-

tioners (defendants) have violated its terms. While the injunction remained in force the petitioners (defendants) were required to obey its terms.

Howat v. *Kansas*, 258 U.S. 181.
Bonifazi v. *Breschi*, 296 Mass. 544, 547.
New York Central Railroad Co. v. *Ayer*, 253 Mass. 122.
Irving & Casson v. *Howlett*, 229 Mass. 560, at 562, 563.
Jennings v. *United States*, 264 Fed. 399.

In this connection the attention of the Court is directed to the principle that is established in the case of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, where this Court overruled the principle of *Swift* v. *Tyson*, 16 Pet. 1, and established the principle that the law of the State governs in a situation such as this (the status of an injunction) and that this Court is bound by the interpretation of the State Court. See *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487. There is no constitutional question involved in the Massachusetts Court's ruling as to the status of this injunction in contempt proceedings. It is consistent with the holding of this Court in *Howat* v. *Kansas*, 258 U.S. 181. The same principle has been applied by this Court in *Prince* v. *Massachusetts*, 321 U.S. 158, where the Court, speaking through Rutledge, J., pointed out that the decision of the Massachusetts Supreme Judicial Court on the interpretation of the language of a statute was binding on the United States Supreme Court, even though the Massachusetts decision was contrary to the trend of decisions in other States.

The case, therefore, must proceed on the basis that the facts set forth in the original bill of complaint, which sought the injunction, were sufficient to justify the issu-

ance of the injunction and in limiting and defining the petitioners' future conduct in connection with this labor controversy. In *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, this Court held that the Courts of the State of Illinois did not violate any constitutional guaranty of freedom of speech in enjoining all picketing in a setting of disorder and continuing intimidation. It held that the Fourteenth Amendment did not bar a State Court from granting injunctive relief in a proper case. In this case Mr. Justice Frankfurter uses the following pertinent language (pp. 292-296):

> ". . . The Constitution is invoked to deny Illinois the power to authorize its courts to prevent the continuance and recurrence of flagrant violence, found after an extended litigation to have occurred under specific circumstances, by the terms of a decree familar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.
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> ". . . To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from

being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. Cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436.

. . . . . .

". . . The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts.

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". . . A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club.

"We have already adverted to the generous scope that must be given to the guarantee of free speech. Especially is this attitude to be observed where, as in labor controversies, the feelings of even the most detached minds may become engaged and a show of

violence may make still further demands on calm judgment. It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. . . . But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees. See *Fox River Co.* v. *Railroad Comm'n,* 274 U.S. 651, 655; *Long Sault Development Co.* v. *Call,* 242 U.S. 272, 277. We are here concerned with power and not with the wisdom of its exercise."

The opinion then goes on to say that there is nothing in it which qualified *Thornhill* v. *Alabama,* 310 U.S. 88, 105, and other similar cases, pointing out that in those cases the Court had before it statutes baldly forbidding all picketing without any aspect of violence being involved, which amounted to an unlimited ban on free communication. It pointed out that even in the *Thornhill* case the Court stated that a statute could be so narrowly drawn as to cover situations of imminent or aggravated danger, and that, if a statute could do so, so the law of a State may be fitted to a concrete situation through the authority given by the State to its Court. The opinion closes with this language (p. 299):

"A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for

> legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution."

In the dissenting opinion of Mr. Justice Reed in the same case, the Court's right to limit the number of pickets is recognized in the following language (pp. 318-319):

> "Where nothing further appears, it is agreed that peaceful picketing, since it is an exercise of freedom of speech, may not be prohibited by injunction or by statute. *Thornhill* v. *Alabama,* 310 U.S. 88; *American Federation of Labor* v. *Swing* [312 U.S. 321]. It is equally clear that the right to picket is not absolute. It may, if actually necessary, be limited, let us say, to two or three individuals at a time and their manner of expressing their views may be reasonably restricted to an orderly presentation. *Thornhill* v. *Alabama, supra,* 105. From the standpoint of the state, industrial controversy may not overstep the bounds of an appeal to reason and sympathy."

There is nothing in the decision of this Court in *Cafeteria Employees Union* v. *Angelos,* 320 U.S. 293, which limits the decision in the *Meadowmoor* case. The latter opinion merely holds that on the facts in that case the picketing was peaceful and unaccompanied by falsehoods, and therefore was not subject to Court injunction; in other

words, that the facts did not support the issuance of an injunction. For reasons pointed out earlier in this brief, it must be conclusively assumed that the facts justified the issuance of the preliminary injunction. The petitioners (Brief, page 20) criticise the fact that the injunctive arm of the Court was used for the purpose of maintaining law and order and preventing future wrongful and improper conduct. It is their position that other adequate means available to the State should have been used. It is submitted that this reasoning is fallacious. The petitioners would deny to the Courts of the Commonwealth of Massachusetts the very right which this Court in *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, held that the Courts of a State had.

II. THE TRIAL JUDGE DID NOT COMMIT ERROR IN REFUSING TO GRANT PETITIONERS' MOTIONS FOR A DIRECTED VERDICT AND THEIR SEVERAL REQUESTS FOR RULINGS.

Applying the principle of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, and *Prince* v. *Massachusetts*, 321 U.S. 158, it must follow that the State Court's construction of the language of this injunction and its disposition of the exceptions relating to the denial of the motions for a directed verdict and the several requests for rulings are binding and conclusive on this Court.

III. THE CONVICTIONS FOR CONTEMPT WERE NOT BASED ON INSUBSTANTIAL OR INADEQUATE FINDINGS OF FACT.

Clearly there were sufficient facts, as set forth in the Transcript of the Record and as summarized in the opinion of the Massachusetts Supreme Judicial Court, to justify jury findings that the terms of the preliminary in-

junction had been violated. These were not isolated, disconnected incidents, but were clearly and unmistakably an interrelated course of conduct carried on under the direction and the instructions of the Union leaders, designed by force of numbers to intimidate and coerce those who desired to work, in violation of their constitutional right to a reasonable opportunity to go to and from their work without molestation, interference or intimidation. The large groups that collected at the entrances when shifts were changing were to demonstrate the power and strength of the strikers to the employees of the plaintiff and to instill in them fear and apprehension. This deliberate course of conduct was a clear violation of the language, purpose and intent of the preliminary injunction.

IV. The preliminary injunction was not vague or ambiguous.

The language of the injunction as defined by the trial judge and the Supreme Judicial Court was clear and definite, and the fact that these petitioners sought by their conduct to give such language a strained, uncalled for and distorted interpretation does not serve to make clear and explicit language vague and indefinite. See *New England Novelty Co., Inc.,* v. *Sandberg,* 1944 Adv. Sh. 433, at 441, 443. Paragraph 6 of the injunction, which is relied on by the petitioners, does not make this injunction vague or indefinite. In this connection the Massachusetts Court has held, citing the case of *Senn* v. *Tile Layers Protective Union,* 301 U.S. 468, that the term "peaceful picketing," "implies not only absence of violence but absence of any unlawful act." *R. H. White Co.* v. *Murphy,* 310 Mass. 510, 520. Peaceful picketing and peaceful persuasion, as defined by the trial Court (Record, page 23), must be free of

acts of molestation, intimidation, force and violence, and must be done in such a way that ordinary persons could go to and from work, and would not be intimidated by acts, words or conduct of the strikers.

The recent decisions of this Court in—

Carlson v. *California,* 310 U.S. 106;
Thornhill v. *Alabama,* 310 U.S. 88;
Milk Wagon Drivers Union of Chicago v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287; and
American Federation of Labor v. *Swing,* 312 U.S. 321—

on the question of free speech and free press, have held that picketing, *en masse* or otherwise, conducted so as to occasion "imminent and aggravated danger," was not within the scope of the constitutional protection of free speech.

In *Great Northern Railway Co.* v. *United States,* 208 U.S. 452, this Court held that an objection to the sufficiency of an indictment will not be considered on certiorari where it has not been raised in the Courts below. If the petitioners desired to raise this question, they could have done so by filing a motion to dismiss or demurrer in the Court below.

The provision of paragraph 6 of the preliminary injunction does not make the injunction vague or ambiguous. This provision merely reaffirms the inherent constitutional right afforded to all citizenry. This constitutional right can be legally exercised only in such manner as to come within the interpretation placed upon it by the Courts, and does not protect conduct which is violative of a Court decree, or goes beyond the bounds of peaceful picketing as defined by the Court.

V. The fact that criminal penalties were imposed does not make this a criminal proceeding.

As is pointed out in the opinion of the Supreme Judicial Court, the petitioners' right to a trial by jury is based on the provisions of G.L. (Ter. Ed.) c. 220, sec. 13A (see Statutory Provisions, this Brief, page 2), which establishes certain procedure in equity actions arising out of labor controversies, including a provision for trial by jury, if the alleged wrongful act is of such character as also to constitute a criminal offense under the laws of the Commonwealth. As is pointed out in the opinion of the Supreme Judicial Court, the fact that criminal penalties were imposed upon the defendants does not make that which otherwise would be a civil remedial proceeding a punitive one. Nor does the fact that the conduct which constitutes violation also constitutes a criminal offense change the nature of an otherwise remedial civil proceeding for contempt. Nor does the change in procedure have the effect of making what would otherwise be a civil remedial contempt into a punitive one. As to this issue it is also submitted that the principles applied by the Massachusetts Court, and its interpretation of the nature of the contempt proceeding, are binding upon this Court.

The case of *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, relied on by the petitioners, does not aid them. It was a criminal proceeding and the Court held that a statute creating a crime and imposing criminal penalties, which failed to forbid any specific or definite act and punished all acts detrimental to the public interest when unjust and unreasonable in the opinion of the Court and jury, was vague and indefinite and an unconstitutional delegation of legislative power by Congress to a Court and jury. It is pointed out that it is distinguishable from a group of cases, which it cites, where the statute was held

to be valid because the statute did set a standard. This injunction set a clear, definite standard.

VI. THE PRELIMINARY INJUNCTION WAS IN FULL FORCE AND EFFECT AT THE TIME THAT THE ACTS WHICH WERE THE BASIS OF THE CONTEMPT ADJUDICATION OCCURRED.

The injunction was issued on October 22, 1941 (Record, page 31). The petition for contempt was filed and an order of notice was issued thereon on October 24, 1941 (Record, page 34). The evidence that was the basis of the conviction related to the conduct of the petitioners between these two dates (October 22d to October 24th). Clearly an injunction, to have any effect at all as to future conduct arising out of the same labor controversy in which the injunction was issued, must be held to continue in full force and effect at least for the duration of the current labor controversy.

Milk Wagon Drivers Union of Chicago v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287.

United States v. *Railway Employees' Department, American Federation of Labor*, 283 Fed. 479.

Nann v. *Raimist*, 255 N.Y. 307.

If the petitioners wanted the injunction modified or vacated, they had ample remedy, by applying to the Court under G.L. (Ter. Ed.) c. 214, sec. 9A, as is pointed out in the Supreme Judicial Court opinion, at page 441.

Conclusion.

Although this Court has jurisdiction, it should nevertheless refuse to exercise it, it being a discretionary rather than an obligatory one, because (1) the questions sought to be raised are not novel, and have been recently decided by this Court adversely to petitioners' claims, and therefore do not require restatement of the principles involved; (2) the petitioners did not object to the issuance of the preliminary injunction in its present form; (3) the petitioners failed to avail themselves of the speedy and effectual remedy provided by G.L. (Ter. Ed.) c. 214, sec. 9A, for a modification, clarification or interpretation of the injunction.

Respectfully submitted,

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